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IN THE SUPREME COURT
OF THE STATE OF UTAH

SYSTEM CONCEPTS, INC., a Utah
corporation,

Appellant,

vs.

SHIRLEY M. DIXON, an individual,

Respondent.

Civil No. 18034

APPELLANT'S BRIEF

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY, STATE
OF UTAH, THE HONORABLE DAVID B. DEE
PRESIDING

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APPELLANT'S BRIEF

NATURE OF THE CASE

Appellant has proceeded against Respondent requesting, inter alia, preliminary and permanent injunctions restraining and prohibiting Respondent from continuing employment with MetroData, a non-Utah corporation, or providing services to MetroData in connection with the design, development, manufacture, display, exhibition, sale or other promotion of the competing products of MetroData.

DISPOSITION IN LOWER COURT

The Third Judicial District Court, Dee, Judge, denied Appellant's Motion for preliminary injunction.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court's Order denying

Appellant's Motion.

STATEMENT OF FACTS

Appellant and MetroData compete with each other in the manufacture and sale to the cable television industry of sophisticated equipment known as character generators. (Transcript at 7-11, 15, 30; Record at 48, 53-54.) The cable television industry is in its infancy and thus has relatively few potential customers spread over a market area of the continental United States, Alaska and Hawaii. (Transcript at 23.)

On or about May 15, 1978, Appellant employed Respondent (Transcript at 22, 38, Exh. 9; Record at 53-54) who worked as Appellant's sales coordinator and Appellant's national sales manager for the cable television market. (Transcript at 22, 38, 40.) In her work, she became knowledgeable and familiar with Appellant's products, sales methods and customers. (Transcript at 15-18, 22-23, 25-28, 38, 44.). Respondent also was involved in the operational design specifications and technical development of Appellant's multi-channel character generator and other products and had access to proprietary information. (Transcript at 15-18, 39-40, Exh. 10; Record at 48.) Respondent also became the recipient and object of Appellant's good will through her interaction with Appellant's customers (Transcript at 25-27) and as a result of extensive promotional activities and advertising by Appellant designed to create good will in or through Respondent so that she could be more effective in the sale of Appellant's products. (Transcript at 27-28, 46, Exh. 13.).

In order to protect its good will and to prevent com-

petitors from acquiring, appropriating or discovering the distinctive characteristics and design features of Appellant's products and to maintain and protect Appellant's competitive advantage of its products in the industry (Record at 48), Appellant requires all employees, in connection with their employment, to sign a proprietary information and restrictive employment agreement. (Transcript at 11-13.). After commencing employment on May 15, 1978, Respondent signed such an agreement on January 11, 1979 (hereinafter "Agreement"). (Exh. 9; Transcript at 12-13, 38; Record at 48, 53-54.) Respondent's employment was terminable at the will of either party, and she executed the Agreement in consideration of continued employment with Appellant. At approximately the same time, Respondent also received a promotion and raise. (Transcript at 42-43, Exh. 12.) The lower Court specifically found that there existed adequate compensation and consideration for Respondent's execution of the Agreement. (Transcript at 43-44.)

Respondent's Agreement prohibits her from disclosing proprietary and confidential information concerning Appellant's products and marketing programs and from rendering services to any competitor ("Conflicting Organization" in the Agreement) within two years from the date of termination of employment with Appellant, except under certain conditions which have not been met in this case. (Record at 53-54.) Respondent's Agreement further provides that in the event of breach of its terms and conditions by Respondent, Appellant's rights under the Agreement can be enforced by injunction. (Transcript at 37, Exh. 9.)

During March of 1981, Respondent voluntarily terminated her

employment with Appellant and, notwithstanding the Agreement, became and is employed by MetroData as its national sales manager. (Transcript at 29; Record at 48, 53-54.) In such position she is able to (Transcript at 44-45) and has competed for Appellant's customers on behalf of MetroData and unfairly deprived Appellant of the benefit of its good will created in or through Respondent and also of the results of its time, effort and expense incurred in developing, manufacturing and selling its products. (Transcript at 29.)

Following Respondent's employment at MetroData, Appellant commenced this action against both Respondent and MetroData in an effort to restrain such employment relationship and to recover such damages as it had incurred and would incur as a result of breach of the Agreement by Respondent and interference with the Agreement by MetroData. (Record at 2-10.) Subsequent to denial of the preliminary injunction, Defendant MetroData moved for and obtained dismissal of the action as against it on the basis of lack of jurisdiction in Utah. Appellant has not appealed that order, and litigation with Metrodata is in process in the State of California.

Appellant initially obtained a temporary restraining order against Respondent's employment with MetroData, which temporary restraining order was continued for a second ten day period because Appellant was unable to affect service of process upon Respondent. (Record at 12-20.) Such extension expired prior to obtaining service of process, however, and Appellant then moved the lower court for a preliminary injunction after service of process was obtained. (Record at 29-30.) After a hearing on Appellant's motion for a pre-

liminary injunction, at which Appellant was allowed but one hour and fifteen minutes to present its evidence and argument, the lower court denied Appellant's motion and entered the Order appealed from. (Record at 58.) The lower court's Findings of Fact and Conclusions of Law are contained in the Record at 53-54.

Upon petition of Appellant (Record at 60-75) and Answer of Respondent (Record at 76-79), this Court granted Appellant's petition for interlocutory appeal of the lower court's Order on November 13, 1981. (Record at 59.)

ARGUMENT

I. THE EMPLOYMENT CONTRACT IN THIS ACTION IS PROPERLY ENFORCEABLE BY EQUITABLE-INJUNCTIVE RELIEF.

While there are other cases supporting such proposition, Allen v. Rose Park Pharmacy, 120 U. 2d 608, 237 P.2d 823 (1951) (hereinafter "Rose Park"), is the leading and most often cited Utah case holding that a restrictive employment covenant is valid and enforceable when: (1) it is supported by consideration, (2) no bad faith is shown in the negotiation of the contract, (3) the covenant is necessary to protect the good will of the employer and (4) it is reasonable in its restrictions as to time and area. Id. at 828. The covenant at issue meets all of these requirements.

In Rose Park, the plaintiff, a pharmacist, became employed by defendant and sometime thereafter, executed a restrictive employment contract. In the contract plaintiff agreed that, upon termination of his employment, he would not compete with defendant as an employee or principal in the operation of a drug store or pharmacy, within a radius of two miles of defendant's drug store for

a period of five years after termination of employment. While the plaintiff evidently did not acquire trade secrets during his employment, the case noted that he had created a great deal of good will for the employer's business. Id. at 824-27.

Plaintiff brought a declaratory judgment action to determine the validity of the restrictive covenant. Notwithstanding defendant's arguments of lack of consideration and mutuality due to the terminable nature of the employment contract, and of inequity and hardship, this Court held that the contract was supported by consideration. This Court also determined that the employer, when it hired the employee, also purchased the good will accruing to the business by reason of the employee's personal attributes; therefore, the employer was entitled to protect such interest by prohibiting the employee, by covenant, from soliciting or enticing away customers or otherwise competing with the employer. The following quotations clarify and lend understanding to this Court's holding.

Thus, in this jurisdiction, we believe that as long as the restrictions as to time and space are reasonably necessary to the protection of the business and the hardship features of the case do not constitute equitable grounds for rescission, or call for the intervention of other rules of equitable relief, then the court is powerless to relieve a party from the effects of his contract.

Restrictive covenants are generally upheld by the courts where they are necessary for the protection of the business for the benefit of which the covenant was made and no greater restraint is imposed than is reasonably necessary to secure such protection. [Citations omitted]

Id. at 826.

If there is legal consideration given to support it, an employer is equally entitled to the good will created

by his employee, as is the purchaser of an establishment which includes the good will of the business. In both cases, when the individual responsible for creating the good will and the business to which it attaches, become separated, it is necessary to preserve that good will to the business by a covenant on the part of the individual that he will not compete in an area where his personal reputation will detach the old customers from the old business. We hold that a covenant is valid which protects good will as well as trade secrets.

...Therefore, we hold that a covenant not to compete is necessary for the protection of the good will of the business when it is shown that although the employee learns no trade secrets, he may likely draw away customers from his former employer, if he were permitted to compete nearby.

Id. at 827.

The majority opinion in Rose Park acknowledged that if the employer had exercised bad faith in connection with the covenant, intending employment to last merely long enough to bind the employee to the covenant and prevent him from working elsewhere, the covenant would not be enforceable. No such bad faith was found, however, despite the fact that the employee had been terminated by the employer.

This Court also found the Rose Park covenant reasonable based upon Defendant's marketing area and upheld the trial court's finding as to reasonableness of a five year time duration of the restrictive covenant.

The Rose Park case was cited and followed by this Court in Shaw v. Jeppson, 121 v. 155, 239 P.2d 745 (1952) in upholding an injunction enforcing a lawful, necessary covenant not to compete, on the grounds that such covenant and its means of enforcement by injunction were agreed to in a bona fide contract.

As reflected in the above statement of facts, Appellant and

Respondent entered into a continuing employment agreement supported by the same consideration as the employment agreement in Rose Park.

The trial judge's findings of fact and conclusions of law in this case clearly indicate that he followed the dissent and not the binding law of the majority in Rose Park when he concluded that the contract in question was one of adhesion working a hardship upon Respondent. Nevertheless, the dissent in Rose Park is not good or binding law, and the law announced and established by the majority opinion is applicable subject only to: (1) the agreement being supported by consideration, (2) there being no bad faith on Appellant's part, (3) the restrictive covenant being necessary to protect the good will of Appellant and (4) the covenant being reasonable with respect to time and area. Each of these conditions have been satisfied in the manner necessary to uphold the restrictive employment contract in this case.

Not even the trial court had any problem with there being adequate consideration for the restrictive employment contract in that it specifically found the existence of adequate consideration (Transcript at 43-44).

Neither is there any showing of bad faith in this case when Respondent worked for Appellant for approximately three years and then herself voluntarily terminated her employment to work for MetroData.

The Agreement specifically states that Respondent agreed not to become employed by a competitor, a "Conflicting Organization." MetroData, by the uncontroverted testimony in the lower Court (Transcript at 29-30), is a competitor of Appellant and

therefore a Conflicting Organization under the Agreement. Such restrictive employment agreement is necessary and designed to secure to the employer the benefit of the good will Appellant has purchased, created and developed in or through Respondent during the period of her employment.

Through extensive promotions, advertisements and methods of business, Appellant not only allowed development of but freely sought to develop and create good will through Respondent. Appellant displayed Respondent's name and picture as its national sales representative in advertisements of its products (Exh. 13), which were specifically designed to project Appellant's good will and the reputation of its products through Respondent. Under the majority opinion in Rose Park, Appellant is entitled to retain, protect, and preserve the benefits of that good will and reputation and not to have the same transferred to MetroData because Respondent is now employed by it and to be protected against Respondent and MetroData using such good will and reputation to Appellant's detriment in competition with it.

Furthermore, in this case, in addition to Appellant's good will which should be protected by the relief sought here, there is the distinct possibility of misappropriation and use of Appellant's proprietary information by Respondent. Respondent has admitted access to Appellant's proprietary information and involvement with the operational design specifications and technical development of Appellant's multi-channel character generator because of her knowledge of customer needs. (Transcript at 44-45). Due to the nature of her employment with Appellant, she was constantly exposed

to Appellant's sales leads, clientele and marketing data and programs. These are Appellant's property which Respondent agreed to protect and which should be and can only be protected by the injunction sought in this case. Restatement 2d Agency §§ 395, 396 (1958).

Finally, the covenant at issue is reasonable as to time and area under the standards set forth in Rose Park. Testimony below establishes that due to the nature of the cable television industry, Appellant's market is nationwide (Transcript at 23). This is also evidenced by Respondent's work for both Appellant and MetroData as "national sales manager". The covenant is also reasonable as to time. Respondent was with Appellant and developing such good will for a period of three years, and two years to consolidate such good will and develop it in Respondent's replacement is reasonable.

II. APPELLANT HAS MET ITS BURDEN FOR THE PRELIMINARY INJUNCTION SOUGHT.

Those grounds upon which injunctive relief may be granted by Utah courts are as follows:

(e) Grounds for Injunction. An injunction may be granted:

(1) When it appears by the pleadings on file that a party is entitled to the relief demanded, and such relief, or any part thereof consists in restraining the commission or continuance of some act complained of, either for a limited period or perpetually;

(2) When it appears from the pleadings or by affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the party seeking injunctive relief;

(3) When it appears during the litigation that either party is doing or threatens, or is about to do, or is procuring or suffering to be done, some

act in violation of the rights of another party respecting the subject matter of the action, and tending to render the judgment ineffectual;

(4) In all other cases where an injunction would be proper in equity.

U.R.C.P. 65A(e).

With respect to the first ground for injunctive relief that it must appear that the moving party is entitled to the relief demanded, it is not necessary that the moving party's right appear absolutely certain. It is enough that a probable right is shown. 7-Pt. 2 Moore's Federal Practice ¶65.04[1] at 65-39, ¶65.04[4] at 65-67 (1980). The reasons for such lesser showing are, inter alia, that unless a full, final hearing on the merits is held on the request for a preliminary injunction, a plaintiff may hold back evidence at the hearing for preliminary injunction, or have a case which may not yet be fully developed. Moore's Federal Practice, supra, ¶65.04[4] at 65-67. Also, as was particularly the case in this matter (Supra at P. 4 and Transcript 4), time constraints on a hearing on a motion for preliminary injunction may preclude a full, final hearing on the merits.

In order to protect one against whom a preliminary injunction is granted, security is required of the party in favor of whom the injunction is granted.

(c) Security. Except as otherwise provided by law, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

U.R.C.P. 65A(c).

Not only is Appellant entitled to protection through injunctive relief, but it is entitled to be protected in the form of a preliminary injunction pending a final trial on the merits because each of the three specific listed grounds for injunctive relief in U.R.C.P. 65A(e), supra, have been satisfied.

First, Appellant has requested relief restraining the continuance of Respondent's employment with MetroData, and Appellant has shown probable entitlement to its requested relief at the hearing on the motion for the preliminary injunction. Appellant obviously did not have time to introduce all of its currently available evidence in the one hour and fifteen minute hearing, and, in fact, does not yet have all its evidence because its case is not fully developed. No formal discovery has yet occurred. Nevertheless, Appellant did show, based upon the Agreement and the law above discussed, that success is probable, which is sufficient.

If not restrained, the employment relationship between Respondent and MetroData will continue during the pendency of this action, and Respondent, as national sales manager for Appellant's direct competitor, will be allowed to use Appellant's good will that has attached to her and Appellant's proprietary information to Appellant's detriment. This satisfies the second stated ground for injunctive relief that continuance of some act during the litigation would produce great or irreparable injury. It is obviously of great intangible injury to have good will created by the time, expense and effort of one party used in competition against that party. Also, because of the difficulties and speculation involved in proving that any sale made by Respondent to a former customer of Appellant during

the pendency of this action would otherwise have been obtained by Appellant rather than MetroData, Appellant will have great difficulty in proving and therefore being compensated for monetary damages incurred as a result of a preliminary injunction not being in effect.

The third stated ground for injunctive relief, that an act is threatened or is occurring which will tend to render a final judgment ineffectual, is likewise satisfied. Any final judgment would not be able to effectively restore to Appellant the benefits of its good will attached to Respondent or proprietary information of Appellant used against and in competition with Appellant during the pendency of the action.

In addition to Appellant having satisfied the requirements for injunctive relief under the applicable Rule, it must be noted that Respondent has specifically agreed and acknowledged in the Agreement that injunctive relief is appropriate and may be awarded. (Exh. 9).

Perhaps of most importance from a procedural standpoint, any injury which may be suffered by Respondent as a result of a preliminary injunction can be provided for through the requirement that security be posted by Appellant. Appellant has been and is willing to provide such security in an amount to be reasonably set by the court. However, if it is later determined that Appellant is entitled to relief, damages suffered by it during the pendency of the action, which in all probability cannot be monetarily proven, will be lost without protection to Appellant.

III. THE TRIAL COURTS FINDINGS OF FACT AND THE RECORD EVIDENCE DO NOT SUPPORT THE TRIAL COURT'S CONCLUSIONS OF LAW OR ORDER.

The first conclusion of the trial court is stated thus:

1. Issuance of a preliminary injunction at this time would prohibit defendant Dixon from any employment within the industry in which she is trained, thus creating great hardship for defendant Dixon. (Recorded at 54).

The findings of the trial court do not specify "the industry in which [Defendant Dixon] is trained." It may be assumed such is the sales industry and, if so, the restrictive covenant at issue certainly does not prohibit Respondent's working in the sales industry.

Even if the trial court's findings imply that the industry referred to is television equipment sales, the covenant at issue does not prohibit Respondent's selling television equipment. All the covenant does is prohibit Respondent from rendering services to a Conflicting Organization dealing in products, processes or services which resemble or compete with products, processes, or services of Appellant upon or with which Respondent directly or indirectly worked or about which she acquired confidential information. (Exh. 9). The agreement also states in Paragraph 6 that under certain circumstances Respondent can work for a Conflicting Organization. There are no findings, testimony or other evidence to support the breadth of the stated restriction on Respondent's employment.

Consequently, the restrictive covenant works no great hardship on Respondent; likewise there are no findings, evidence or testimony in the record showing any hardship for Respondent.

The second of the trial court's conclusions is stated thus:

2. The contract is a contract of adhesion and because enforcement of it would create substantial hardship to defendant Dixon, plaintiff is not entitled to the equitable remedy of a preliminary injunction. (Record at 54).

Plaintiff again submits that there is nothing in the record to support the conclusion of substantial hardship to Respondent. Neither are there findings of fact, testimony or evidence to support the conclusion of a contract of adhesion. To the contrary, the record indicates that Respondent's employment with Appellant was always terminable at will, and the consideration for the Agreement was Respondent's continued employment, promotion and raise. The trial judge specifically found such to be adequate consideration. (Transcript at 43-44.) Furthermore, no bad faith within the purview of Rose Park was found; Respondent worked for Appellant for three years and then voluntarily terminated her employment. Absent such bad faith, such covenants have been enforced because they have reasonable commercial purpose in protecting business good will and proprietary information and do not, absent bad faith, work hardship.

The third conclusion of the trial court is stated thus:

3. Plaintiff has failed to meet the standards of Rule 65A of the Utah Rules of Civil Procedure governing issuance of a preliminary injunction. (Recorded at 54).

The standards of Rule 65A are not dealt with at all in the findings. For the reasons set forth in Section II of this Argument based on the record evidence, Plaintiff has met the standards

necessary to warrant this Court's reversal of the lower court's denial of a preliminary injunction.

CONCLUSION

Enforcement by injunction of restrictive employee covenants such as the one sought to be enforced here has previously been allowed by this Court. The instant covenant is supported by consideration; no bad faith has been shown in its negotiation; the covenant is necessary to protect the good will of Appellant's business, as well as its proprietary information; and the covenant is reasonably restrictive as to time and area in light of Appellant's business and marketing area. Therefore, the instant case is indistinguishable and fully governed by Rose Park and its progeny.

As shown by the record evidence, Appellant has met its Rule 65A(e) burden of establishing grounds for a preliminary injunction. Appellant, with time and evidence constraints notwithstanding, has shown probable success on the merits; Appellant, if Respondent's employment is allowed to continue, will suffer great and irreparable injury; any final judgment, due to Respondent's unlawful competitive employment, cannot restore to Appellant damages occasioned by the deprivation of its good will and proprietary information.

The lower court's conclusions of law pursuant to which it denied a preliminary injunction are not supported by its findings of fact or testimony at the preliminary injunction hearing.

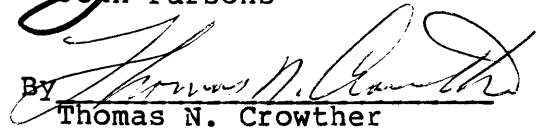
Therefore, because Respondent can be protected by the posting of security from any resulting harm from the entry of a pre-

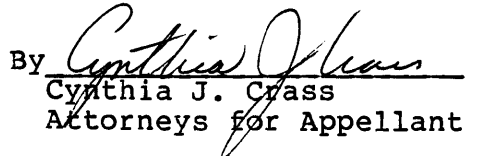
liminary injunction and because Appellant cannot likewise be protected from denial of a preliminary injunction if later shown to be entitled to a permanent injunction, the lower Court should be reversed and directed to enter a preliminary injunction as requested by Appellant.

Respectfully submitted this 22nd day of February, 1982.

PARSONS & CROWTHER

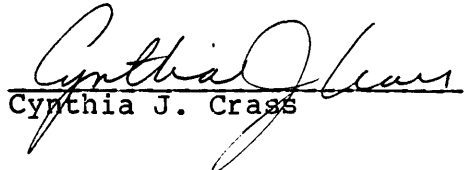
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CERTIFICATE OF SERVICE

I hereby certify that I ~~mailed~~ ^{hand delivered} ~~postage prepaid~~, two copies of the foregoing Appellant's Brief to Ellen Maycock, Kruze, Landa, Zimmerman & Maycock, 620 Kearns Building, 136 South Main Street, Salt Lake City, Utah 84101, Attorney for Respondent, this ^{23rd} ~~22nd~~ day of February, 1982. ^{cg}


Cynthia J. Crass